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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK O. BECKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether failure to file a tax return is a lesser included offense of tax evasion in a *Spies*-type evasion case for purposes of the Double Jeopardy Clause?

2. Whether 26 U.S.C. § 7201 describes two separate and distinct crimes, thereby precluding indictment charging one of these offenses from being enlarged at trial to include the uncharged offense?

3. Whether Section 3C1.1 of the federal Sentencing Guidelines unconstitutionally penalizes a criminal defendant for exercising his constitutional right to stand trial and to testify on his own behalf?

4. Whether the district court's good faith belief instruction, which substituted the word "actually" in place of the word "objectively", was violative of *Cheek v. United States*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frank O. Becker respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on June 5, 1992.[1]

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is *Appendix A* to this Petition.

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[1] The third Question Presented herein is similar to the question recently accepted for review by this Court in the case of *United States v. Dunnigan*, 944 F.2d 178 (4th Cir.), *modified*, 950 F.2d 149 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3798 (U.S. May 26, 1992) (No. 91-1300).

JURISDICTIONAL STATEMENT

The June 5, 1992 judgment of the United States Court of Appeals for the Seventh Circuit (*Appendix A*) affirmed petitioner's July 18, 1991 conviction (*Appendix B*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, . . . to be informed of the nature and cause of the accusation; . . . to have compulsory process for obtaining witnesses in his favor . . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 U.S.C. § 7201 provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . .

26 U.S.C. § 7203 provides in pertinent part:

> Any person required under this title to pay any . . . tax, or required . . . to make a return, . . . who willfully fails to pay such . . . tax, make such return, . . . shall . . . be guilty of a misdemeanor . . . .

§ 3C1.1, United States Sentencing Guidelines, provides:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, i.e., the district court, was 18 U.S.C. § 3231.

The questions presented in the instant petition are legal in nature, and are thus not fact-sensitive. The following statement provides a concise overview of the factual background upon which the present issues are predicated.

In March 1989, petitioner Dr. Frank O. Becker was indicted on six counts of tax evasion under 26 U.S.C. § 7201 and six counts of failure to file income tax returns under 26 U.S.C. § 7203 for the calendar years 1982-1987. The charging language of the indictment alleged that petitioner attempted to "evade and defeat said income tax due and owing to the United States." Failure to file a return was specifically listed as one of the affirmative acts of evasion under each of the § 7201 counts. (App. A at 6)

At the close of the government's case and at the close of all evidence, the petitioner moved for a judgment of acquittal on the grounds that the prosecution constructively amended the indictment to include the crime of payment evasion, when the grand jury only charged assessment evasion. Petitioner's motions were denied on the theory that 26 U.S.C. § 7201 contains only one offense, i.e., generic tax evasion. (App. A at 4)

Petitioner testified on his own behalf at trial. In this regard, petitioner requested a good faith belief instruction under *Cheek v. United States*, 498 U.S. ____, 111 S.Ct. 604 (1991). Petitioner objected to the government's proposed instruction on the grounds that it employed the term "actually" to qualify both the level of belief and the degree of "reasonableness" at issue.[2] (Tr. 520-521) Moreover, petitioner's proposed *Cheek* instruction omitted the word "actually." However, the court gave the instruction tendered by the prosecution. (App. A at 8) A correct good faith belief instruction was pivotal in petitioner's case because the trial court denied both petitioner's reliance on advice of counsel and theory of defense instructions. Furthermore, the trial judge noted that the defendant's good faith belief was "the battle ground in this case as I see it." (Tr. 58, 62)

Petitioner was convicted by a jury on all counts. Subsequently, petitioner was sentenced to three years' imprisonment on the tax evasion counts under § 7201 and an additional (i.e., consecutive) three years' imprisonment on the

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[2] Contrary to the Seventh Circuit's out-of-context representation of defense counsel's remark that the government's instruction was "essentially a correct statement of the law" (App. A at 8), defense counsel simultaneously and specifically objected to the use of the word "actually" in the prosecution's proposed instruction.

failure to file counts under § 7203, despite petitioner's contention that § 7203 was a lesser included offense of § 7201 under the indictment as drafted by the government. (App. A at 13-14) Petitioner's sentence was also enhanced by the trial judge for alleged perjurious trial testimony under U.S.S.G. § 3C1.1, over the petitioner's objection. (App. A at 12-13)

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) sets forth, as a reason for granting certiorari, that a court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter. Each of the first three issues presented by petitioner involves a serious conflict among the Federal Circuits. These issues concurrently involve federal questions which were decided in conflict with applicable decisions of this Court. *See* Sup. Ct. R. 10.1(c). The final question raised by petitioner concerns the Seventh Circuit's persistent refusal to permit juries to be instructed on an unfettered "subjective" willfulness standard in criminal tax cases, despite this Court's recent mandate pronounced in *Cheek v. United States*, 498 U.S. ____, 111 S.Ct. 604 (1991), which issue provides additional grounds for granting certiorari pursuant to Sup. Ct. R. 10.1(c). Each of the legal issues presented merits review by this Honorable Court.

I.

FAILURE TO FILE A TAX RETURN IS A LESSER INCLUDED OFFENSE OF TAX EVASION IN A *SPIES*-TYPE EVASION CASE, AND, AS SUCH, CANNOT SUPPORT A SEPARATE CONVICTION AND CUMULATIVE SENTENCE.

The Seventh Circuit Court of Appeals stands alone in its holding that 26 U.S.C. § 7203 (failure to file) is not

a lesser included offense of 26 U.S.C. § 7201 (tax evasion) for double jeopardy purposes. *See* App. A at 13-14. Such holding is not only in direct conflict with at least five other circuits, but is contrary to the official position of the Department of Justice, as well. Moreover, the Seventh Circuit's ruling in this regard is contrary to this Court's decisions in both *Sansone v. United States*, 380 U.S. 343, 349, 351 (1965) and *Spies v. United States*, 317 U.S. 492, 497, 499 (1943).

A. Constitutional Principles

The Fifth Amendment provides, in relevant part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional guarantee has been held to protect against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In so holding, the Court reaffirmed a fundamental maxim which it pronounced well over a century ago: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1874). Accordingly, this Court has declared that the Fifth Amendment clearly forbids cumulative punishment for a greater and lesser included offense. *Brown v. Ohio*, 432 U.S. 161, 169 (1977); *Jeffers v. United States*, 432 U.S. 137, 150 (1977).

Petitioner was charged in a *Spies*-type evasion case, i.e., an evasion case where there is a failure to file returns. *See Spies*, *supra*, 317 U.S. at 499. Specifically, each of the tax evasion counts charged in the indictment contained language that petitioner "willfully and knowingly did attempt to evade and defeat said income tax due and owing to the United States . . . (a) By failing to make such in-

come tax return . . ." It is undisputed (except in the Seventh Circuit) that where one of the affirmative acts of evasion relied upon by the government in proving attempted tax evasion under 26 U.S.C. § 7201 is the failure to file an income tax return, such failure to file is a lesser included offense, and Congress did not intend for a defendant to be punished for both offenses. *United States v. Snyder*, 766 F.2d 167, 171 (4th Cir. 1985); *United States v. Buckley*, 586 F.2d 498, 504-505 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). As a matter of fact, in *Buckley, supra*, the government specifically conceded that, in a *Spies* evasion case, punishment cannot be imposed under both 26 U.S.C. § 7201 and § 7203. *Id.* at 504.

In identical manner, the Department of Justice presently instructs federal prosecutors throughout the United States that "in *Spies* evasion cases, the failure to file is a lesser-included offense (citation omitted)." *Criminal Tax Manual*, U.S. Dept. of Justice, § 8.04 (1991). Similarly, the official position of the Department of Justice was no different during the years for which petitioner was indicted:

> Note that the charge in a *Spies* evasion case is framed in terms of a failure to file plus an affirmative act, and the failure to file is a lesser included offense. Where there is a substantive failure to file charge in addition to the *Spies* evasion charge, the defendant cannot be convicted and sentenced on both the evasion and the failure to file counts (citations omitted). *Criminal Tax Manual, supra*, § 40.04 n.3 (Feb. 1987).

Moreover, it seems almost axiomatic that where one offense is specifically included within another by the express language of the charging instrument, "it cannot support a separate conviction and sentence." *Id.*; *Snyder, supra*, 766 F.2d at 171 (citing *Jeffers, supra*, 432 U.S. 137). It was clearly with this principle in mind that this Court in *Sansone v. United States* concluded: "Since there is

no doubt that §§ 7201 and 7203 also apply to income tax violations, with obvious overlapping among them, *there can be no doubt that the lesser-included offense doctrine applies to these statutes in an appropriate case* (emphasis added)." *Id.*, 380 U.S. at 349. *See Spies*, *supra*, 317 U.S. at 497 (in the context of discussing the precursors to §§ 7201 and 7203, the court noted "[w]e think it clear that this felony may include one or several of the other offenses against the revenue laws"). As recognized by all other circuits which have addressed this question, as well as the Department of Justice, a *Spies* evasion prosecution constitutes "an appropriate case" for invocation of the lesser included offense doctrine for double jeopardy purposes.

B. The Other Circuits

For the past twenty years (and as recently as May of 1992), every other circuit which has ruled on this issue has uniformly held that 26 U.S.C. § 7203 is a lesser-included offense of 26 U.S.C. § 7201 and that a defendant may not be cumulatively punished under both statutes. *United States v. Rosenthal*, 454 F.2d 1252, 1255-1256 (2d Cir.), *cert. denied*, 406 U.S. 931 (1972) ("Congress did not intend two punishments for the same crime"—conviction and sentence on § 7203 count vacated); *United States v. McGill*, 964 F.2d 222, 239-240 (3d Cir. 1992) (the courts "have repeatedly stated that § 7203 is included within § 7201"); *United States v. Snyder*, *supra*, 766 F.2d at 171 (4th Cir. 1985) (failure to file an income tax return is a lesser included offense in a *Spies* evasion case—convictions and sentences under misdemeanor counts vacated); *United States v. Doyle*, 956 F.2d 73, 74-75 (5th Cir. 1992) (§ 7203 misdemeanor is a lesser included offense of § 7201 felony—vacated and remanded); *United States v. Buckley*, *supra* 586 F.2d at 504-505 (5th Cir. 1978) (failure to file is a lesser included offense where it is one of the affirmative acts

relied upon in proving attempted tax evasion—§ 7203 convictions and sentences vacated); *United States v. Cook*, 505 F.2d 659, 664-665 (5th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975); *United States v. Newman*, 468 F.2d 791, 796 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973) (it is improper to impose sentences under both §§ 7201 and 7203 where one offense is a lesser included offense of the other—§ 7203 convictions and sentences vacated); *United States v. Boone*, 951 F.2d 1526, 1541 (9th Cir. 1991) ("The misdemeanor of willful failure to file an income tax return is a lesser included offense of the felony of willful attempt to evade or defeat income taxes"); *United States v. DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987), *cert. denied*, 490 U.S. 1035 (1991) ("It is undisputed that § 7203 defines a lesser included offense of § 7201"). *See also United States v. Overton*, 617 F. Supp. 5, 8 (D. Mich. 1985). *Cf. Gaunt v. United States*, 184 F.2d 284, 288 (1st Cir. 1950) (filing a false return is a lesser included offense of tax evasion); *United States v. Lodwick*, 410 F.2d 1202, 1205-1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969) (same); *United States v. Kaiser*, 893 F.2d 1300, 1306-1307 (11th Cir. 1990) (26 U.S.C. § 7206(1) a lesser included offense of § 7201).

In the above eight Federal Circuits a defendant accused of tax evasion does not relinquish his Fifth Amendment right to be free from cumulative punishment for a greater and lesser included offense. Only in the Seventh Circuit is a tax defendant assured of being twice put in jeopardy for the "same offense", which disparate treatment incidentally raises serious equal protection considerations. U.S. Const. amend. XIV, § 1.

C. The Seventh Circuit

The Seventh Circuit stands alone in its presumption that the failure to file returns is not a lesser included offense of tax evasion in a *Spies* evasion case. In *United States*

v. Foster, 789 F.2d 457, 459-460 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986), the Seventh Circuit first posited its unique holding that, in a *Spies* situation, tax evasion (§ 7201) and failure to file (§ 7203) constitute two separate and distinct offenses for double jeopardy purposes. The Seventh Circuit has consistently adhered to its decision in *Foster*. *See United States v. Davenport*, 824 F.2d 1511, 1519 (7th Cir. 1987); *United States v. Buckner*, 830 F.2d 102, 104 (7th Cir. 1987); *United States v. Defazio*, 899 F.2d 626, 636 (7th Cir. 1990). Interestingly, throughout all of the aforementioned opinions, the court has never once mentioned the myriad of opposing cases on this issue from its sister circuits. Instead, the Seventh Circuit simply instructs those who appeal cumulative sentences under 26 U.S.C. §§ 7201 and 7203 that the law "is well settled in this Circuit." (App. A at 14)

The Seventh Circuit's radical departure from the uniform law of the other Federal Circuits may be traced to its apparent antagonism toward so-called "tax protesters", an intolerance for whom the court openly acknowledges. *See McLaughlin v. Commissioner*, 832 F.2d 986, 986-987 (7th Cir. 1987) ("Tax protesters . . . are thorns in the side of the federal judiciary"); *Cheek v. United States*, 498 U.S. ____, 111 S.Ct. 604, 609 n.7 (1991) (the Seventh Circuit is noted to have stated that certain stock arguments of "the tax protester movement, have not been, nor ever will be, considered 'objectively reasonable' in this circuit . . ."). In this regard, it is in no wise coincidental that the Seventh Circuit's novel double jeopardy decision in *Foster* was handed down at the exact time that the court actively instituted its "objectively reasonable" standard, which test this Court recently rejected in *Cheek v. United States*, *supra*. As a matter of fact, *Foster*, *Davenport*, and *Buckner* all involved so-called "tax protesters" and each case concurrently raised issues concerning double jeopardy

and the propriety of the "objectively reasonable" standard. The evolution of Seventh Circuit law eroding the Fifth Amendment's double jeopardy safeguard is clearly tied to the circuit's animus toward those *it* deems to be "tax protesters." The circuit's erroneous and paternalistic view that a citizen should be subjected to harsher punishment simply because the court has determined that an accused belongs to a class representing a thorn in the court's side is wrong. The Fifth Amendment does not discriminate against those who may invoke its protections. *See Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (Double Jeopardy Clause prevents the sentencing court from imposing greater punishment than the legislature intended).

In short, the Seventh Circuit's position is anomalous. Neither petitioner Becker, nor any other defendant, should be subjected to double punishment for the "same offense." The Fifth Amendment forbids it. The decisions of this Court forbid it. The Department of Justice instructs against it. Moreover, the facts in the instant case are simple and uncluttered, making this legal issue ripe for adjudication.

Like an ostrich, the Seventh Circuit is deliberately burying its head in an effort to ignore the conflict which presently exists between itself and the other Federal Circuits (which conflict was duly noted recently by the Eleventh Circuit in *Kaiser*, *supra*, 893 F.2d at 1306-1307). Only the Supreme Court can pull the head of this judicial ostrich out of the sand.

II.

26 U.S.C. § 7201 DESCRIBES TWO SEPARATE AND DISTINCT CRIMES, THEREBY PRECLUDING INDICTMENT CHARGING ONE OF THESE OFFENSES FROM BEING ENLARGED AT TRIAL TO INCLUDE THE UNCHARGED OFFENSE.

It is presently the position of the Seventh Circuit Court of Appeals that "Section 7201 creates only one crime: tax evasion." *See* App. A at 4. Not only does such holding depart from the previous decisions of the Seventh Circuit, but it is clearly contrary to this Court's holding in *Sansone v. United States*, 380 U.S. 343, 354 (1965) and is contrary to the published position of the Department of Justice, as well. Moreover, the Seventh Circuit is involved in a serious conflict among the Federal Circuits over whether 26 U.S.C. § 7201 defines one offense, i.e., tax evasion, or two offenses, viz., 1) evasion of assessment and 2) evasion of payment. This dispute, which has evoked criticism among the several circuits, has widespread constitutional implications, including notice, due process, grand jury and double jeopardy considerations, and therefore merits instruction and resolution by this Honorable Court.

A. Two Crimes

26 U.S.C. § 7201 states that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony." This Court has long acknowledged that the above statute provides for *two* separate offenses, specifically holding that: ". . . § 7201 includes the offense of willfully attempting to evade or defeat the *assessment* of a tax as well as the offense of willfully attempting to evade or defeat the *payment* of a tax." *Sansone*, *supra*, 380 U.S. at 354 (citing *Lawn v. United States*, 355 U.S. 339, 361-362 (1958)).

In following *Sansone*, the Department of Justice instructs federal prosecutors throughout the United States that: "Section 7201 describes two separate and distinct crimes: (a) the willful attempt to evade or defeat taxes; and, (b) the willful attempt to evade or defeat the payment of taxes (citations omitted)." *Criminal Tax Manual*, U.S. Dept. of Justice, § 8.02 (1991). The Department of Justice defines the first crime, i.e., assessment evasion, as including attempts to evade the government's effort to ascertain a citizen's tax liability, such as by filing false tax returns which omit income or claim unwarranted deductions. *Id.* The Department of Justice *Manual* describes the second of the § 7201 crimes, i.e., payment evasion, as generally including the concealment of assets in order to avoid payment after an assessment has been made. *Id.*

In like manner (and consistently for at least thirty years since this Court's decision in *Lawn*), every circuit which addressed this issue uniformly ruled that § 7201 describes two separate and distinct crimes. *See United States v. Hogan*, 861 F.2d 312, 315 (1st Cir. 1988) ("Section 7201 defines two distinct crimes"); *United States v. Mollet*, 290 F.2d 273, 274 (2d Cir. 1961) (§ 7201 prohibits both attempts to evade any "tax" and attempts to evade "the payment thereof"); *United States v. Hook*, 781 F.2d 1166, 1169 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986); *United States v. Conley*, 826 F.2d 551, 553 n.1, 557 (7th Cir. 1987) ("26 U.S.C. § 7201 provides for two offenses"); *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984) (§ 7201 defines "two distinct crimes"); *United States v. Voorhies*, 658 F.2d 710, 713 (9th Cir. 1981); *Cohen v. United States*, 297 F.2d 760, 770 (9th Cir. 1962) (§ 7201 should be given "a disjunctive effect" for double jeopardy purposes).

Most circuits continue to strictly adhere to this Court's ruling in *Sansone*. *See, e.g., United States v. Waldeck*, 909 F.2d 555, 557-558 (1st Cir. 1990) ("two separate crimes");

United States v. McGill, 964 F.2d 222, 230 (3d Cir. 1992) ("Section 7201 encompasses two kinds of affirmative behavior: the evasion of assessment and the evasion of payment"). However, since 1990, several circuits (including the Seventh Circuit) have departed from *Sansone* and have independently concluded that § 7201 defines, in fact, only one crime. *See* D. McGowen, D. O'Day & K. North, *Criminal and Civil Tax Fraud*, § 16.42 (Supp. 1991) ("There is a line of case authority which erroneously holds that I.R.C. § 7201 constitutes a single offense"). In response to this judicial disregard of this Court's holding in *Sansone*, the First Circuit Court of Appeals recently remarked: "We are not so bold as to either ignore or shunt *Sansone* aside." *Waldeck*, *supra*, 909 F.2d at 558. It is this dispute which has led to the present conflict among the Federal Circuits.

B. One Crime

The first instance of deviation from this Court's long-standing holding in *Sansone* came from the Fifth Circuit in *United States v. Masat*, 896 F.2d 88 (5th Cir. 1990). Therein, the court stated: "In truth, there is one crime [in § 7201], the evasion of taxes." *Id.* at 91. In *Waldeck*, the First Circuit noted that *Masat* made "no reference at all" to *Sansone*. *Waldeck*, *supra*, 909 F.2d at 557.

Next, in the case of *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir. 1990), *vacated and remanded on other grounds*, ____ U.S. ____, 111 S.Ct. 747 (1991), the Seventh Circuit similarly decided that "Section 7201 creates only one crime: tax evasion." The court in *Waldeck* likewise criticized *Dunkel*'s ruling, pointing out that the Seventh Circuit "did not completely ignore *Sansone*, but it did not let it stand in the way of its holding." *Waldeck*, *supra*, 909 F.2d at 557. Furthermore, by its ruling in *Dunkel*, the Seventh Circuit completely departed from its previous

decisions in *Dack* (1984) and *Conley* (1987), which raises serious ex post facto problems in petitioner's case.[3] U.S. Const. art. I, § 9, cl. 3.

Most recently, in *United States v. Mal*, 942 F.2d 682 (9th Cir. 1991), the Ninth Circuit concluded that "§ 7201 charges only the single crime of tax evasion." *Id.* at 688. In so holding, the court effectively overruled its decisions in *Voorhies* and *Cohen*, the latter case dating from as far back as 1962. *See Mal, supra*, 942 F.2d at 686-689.

It should further be noted that each of the aforementioned decisions was rendered upon a claim that the indictment at issue was duplicitous. Petitioner's case is more egregious in that it raises a clear-cut case of constructive amendment, in violation of the Fifth and Sixth Amendments, which thus provides this Court with an ideal vehicle to resolve the present conflict.

C. Constitutional Implications

The question of whether 26 U.S.C. § 7201 defines one crime or two separate and distinct offenses directly impacts upon a number of the most fundamental of constitutional guarantees. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. This constitutional requirement of notice defines one of the most basic tenets of due process of law. U.S. Const. amend. V. *See Fowell v. Alabama*, 287 U.S. 45, 68 (1932) (notice is an essential element of due process). Inherent in due process is an accused's right to have notice of which *particular* offense he must defend against. *See Russell v. United States*, 369 U.S. 749, 768 (1961) (indictment must set out specific offense with which defendant is charged).

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[3] Petitioner was indicted for the calendar years 1982-1987.

The charging language of petitioner's indictment alleged that he "willfully and knowingly did attempt to evade and defeat said income tax due and owing to the United States." This specific wording clearly defines the crime of willfully attempting to evade or defeat a tax (assessment evasion) *rather than* the crime of willfully attempting to evade or defeat the payment of a tax (payment evasion). *See Waldeck*, *supra*, 909 F.2d at 558; *United States v. Hart*, 673 F. Supp. 932, 937 (N.D. Ind. 1987). Accordingly, petitioner's defense at trial was directed towards demonstrating that none of the acts alleged against him in any way impeded the government from ascertaining his alleged tax liability. Had petitioner been charged with payment evasion, the focus of his defense would have been altered entirely and he would have, of course, been forced to confront the government's evidence in an entirely different manner (including the production of other witnesses, etc.). Trial preparation and defense strategy (in addition to potential pre- and post-trial motions) illustrate just several of the reasons why the Seventh Circuit's recent holding, viz., that § 7201 no longer describes two separate offenses, directly undermines a defendant's constitutional right to notice and due process of law. For as this court recognized in *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939): "No one may be required at peril of life, liberty or property to speculate as to meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Next, the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. This constitutional provision expresses and reaffirms the common law doctrine that a defendant cannot be held to answer a charge not contained in the indictment brought against him. *See Ex*

parte Bain, 121 U.S. 1, 9-10 (1887); *Stirone v. United States*, 361 U.S. 212, 215-217 (1960); *United States v. Miller*, 471 U.S. 130, 142-143 (1985). In *Stirone*, this Court unanimously held that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.*, 361 U.S. at 215-216.

In the instant case, petitioner was charged only with assessment evasion by the grand jury. Prior to the government calling its first witness at trial, defense counsel specifically distinguished between the two concepts contained in § 7201 and noted that petitioner was *not* charged with payment evasion. (Tr. 60) The prosecution did not disagree at that time. However, the government apparently became dissatisfied with its proof in support of *assessment* evasion as charged in the indictment. For example, by its arguments to the court and to the jury regarding *payment* evasion and by its assets disposition evidence, the government proceeded to alter and broaden the scope of the indictment to include the crime of *payment* evasion, an offense not charged by the grand jury. At the close of the government's case, petitioner moved for a judgment of acquittal on the grounds of the above constructive amendment. At this hearing, the government informed petitioner, *for the first time*, that he was being charged with payment evasion. The prosecutor then argued that petitioner was charged with both assessment evasion and payment evasion, and that there was no difference between the two. (Tr. 318-319) *See* App. A at 4 (the Seventh Circuit likewise disposed of this issue by holding that Section 7201 contains only one offense). This represents exactly the type of prejudicial surprise at trial which the Grand Jury Clause was intended to prevent. *See Stirone*, *supra*, 361 U.S. at 218 (very purpose of indictment provision is to limit a defendant's jeopardy to

offenses charged by fellow citizens acting independently of either government attorney or judge).

If § 7201 describes two separate and distinct offenses, then petitioner's indictment was impermissibly altered and enlarged in violation of the Fifth Amendment. On the other hand, if § 7201 contains only one offense, this Court should so clarify in order that the fundamental rights of tax defendants are not placed "at the mercy or control of the court or prosecuting attorney." *Bain*, *supra*, 121 U.S. at 13. Presently, tax evasion defendants in the dissenting circuits are in the untenable position of not knowing beforehand which of the § 7201 offenses (if not both) they will have to defend against, while prosecutors enjoy unbridled discretion to choose *ad hoc* which offense during the course of trial best suits their purpose and evidence, without ever having to first present the specific charge to the grand jury. This intolerable situation not only imposes a flagrantly unconstitutional burden upon the defendant, but reduces the criminal justice system to nothing more than a prosecutorial guessing game or an ambush.

Lastly, the Double Jeopardy Clause prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); U.S. Const. amend. V. The question of whether § 7201 contains one or two crimes raises immediate double jeopardy concerns. For example, in *Cohen*, *supra*, 297 F.2d at 770, the government argued that an attempt to evade and defeat tax was different from an attempt to evade and defeat *payment* of tax for double jeopardy purposes. The court agreed, remarking "[s]urely the two offenses are not necessarily the same." *Id.* However, a number of circuits now hold that § 7201 defines only one crime. While not a direct issue in this case, this type of confusion and disparity leads to the absurd result that an individual in one area of the country can be tried and punished twice for the same conduct for

which another party can only be sentenced once. Such random inequality surely cannot stand in the face of justice. *See* U.S. Const. amend. XIV, § 1.

In summary, in addition to the direct conflict presently existing among the Federal Circuits, the foregoing examples from petitioner's case vividly illustrate the need for intervention by this Court in order to avoid the grave constitutional problems which arise when appellate courts differ on the number of offenses contained in the same penal statute.

III.

SECTION 3C1.1 OF THE FEDERAL SENTENCING GUIDELINES UNCONSTITUTIONALLY PENALIZES A CRIMINAL DEFENDANT FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO STAND TRIAL AND TO TESTIFY ON HIS OWN BEHALF.

The issue presented by petitioner herein is very similar to the question recently accepted for review by this Court in the case of *United States v. Dunnigan*, 944 F.2d 178 (4th Cir.), *modified*, 950 F.2d 149 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3798 (U.S. May 26, 1992) (No. 91-1300). As a matter of fact, petitioner relied in part upon *Dunnigan* when challenging the constitutionality of the "obstruction" enhancement in his case. The Seventh Circuit did not specifically address petitioner's constitutional objections in its opinion, instead choosing to affirm the district court's finding under the "clear error" standard. *See* App. A at 12-13. However, while petitioner's case was pending on appeal, the court did cursorily refer to *Dunnigan* in another decision, but elected not to follow its lead. *See United States v. Jones*, 950 F.2d 1309, 1316 (7th Cir. 1991).

Moreover, since the Fourth Circuit has already enumerated the circuits with which its holding in *Dunnigan* con-

flicts, petitioner will not repeat such listing here. *Id.*, 944 F.2d at 183.

A. Right to Testify

The right of a criminal defendant to take the witness stand and testify in his or her own behalf has foundations in a number of constitutional provisions, including the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987). *See* U.S. Const. amends. V, VI and XIV.

First of all, this Court has declared that the right to testify on one's own behalf at a criminal trial is one of the guarantees "essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). *See also* U.S. Const. amend. V. In this regard, it has been held that the Due Process Clause of the Fourteenth Amendment secures the "right of a criminal defendant to choose between silence and testifying in his own behalf." *Ferguson v. Georgia*, 365 U.S. 570, 602 (1961) (Clark, J., concurring). Secondly, the right to testify is inherent in the Sixth Amendment's mandate that a defendant have "compulsory process for obtaining witnesses in his favor." *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); *Rock*, *supra*, 483 U.S. at 52 ("the most important witness for the defense in many criminal cases is the defendant himself"). *See Faretta*, *supra*, 422 U.S. at 819 (Sixth Amendment grants an accused the right to make his defense personally). Thirdly, the right to testify is necessarily included in the Fifth Amendment's guarantee against self-incrimination. *Harris v. New York*, 401 U.S. 222, 225, 230 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so").

In short, this Court has recognized that "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). It is this fundamental right, and the strategic choice accompanying it, which Section 3C1.1 of the Sentencing Guidelines (U.S.S.G.) impermissibly infringes upon.

B. Unconstitutionality of § 3C1.1, U.S.S.G.

In *United States v. Jackson*, 390 U.S. 570, 581 (1968), this Court stated that if a "provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." In so far as the Sentencing Guidelines presently permit enhancement of a defendant's sentence solely on the basis that a defendant testified on his own behalf at trial, but was unsuccessful, U.S.S.G. § 3C1.1 is just such an unconstitutional provision.

Section 3C1.1 provides for an increase in the offense level by two points for "obstruction". The commentary to § 3C1.1 lists committing or suborning perjury as conduct meriting an upward adjustment for "obstruction of justice." *Id.*, comment. (n.3(b)) (Nov. 1990). The commentary further states that "[t]his provision is not intended to punish a defendant for the exercise of a constitutional right." *Id.*, Application Note 1. In addition, a defendant's testimony and statements are, theoretically, to be viewed "in a light most favorable to the defendant." *Id.* However, these latter "safeguards" are nothing more than hollow assurances which pay lip service to a defendant's constitutional rights, while providing prosecutors and courts with a mechanical means to effect sentencing over-kill upon any defendant who is deemed to be a thorn in the side of the judiciary or who refuses to bargain with government at-

torneys and has "the audacity to deny the charges against him." *Dunnigan, supra*, 944 F.2d at 183.

In the present case, as evidenced by the trial court's own words, petitioner's sentence was enhanced under § 3C1.1 based upon the jury's verdict. For example, the court stated:

> I think its fair to infer that this jury did not believe the defendant. . . .
>
> The jury was not asked to decide this, although I know as a premise they decided at least at the very minimum that they did not believe the defendant, ...
>
> * * *
>
> It didn't work with the jury. It doesn't work with this Court, and it's difficult for me to believe that anyone ever would have expected that it would work. (Sent. Tr. 11-12)

As a matter of fact, even after a specific request by defense counsel, the district court refused to state the evidentiary basis (i.e., documents or testimony) for its finding of perjury. (Sent. Tr. 12-13) At a minimum this represents a finding of perjury based upon an arbitrary exercise of judicial power. The court clearly punished the petitioner because he had the audacity to testify on his own behalf and was unfortunate enough, for reasons beyond his control, to be convicted. Enhancements which are predicated upon nothing more than a jury's verdict are impermissible. *See United States v. Wiley*, 278 F.2d 500, 504 (7th Cir. 1960) ("we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful"). Guilty verdicts may be occasioned by factors beyond the petitioner's control such as improper jury instructions, trial errors, witness credibility, prosecutorial misconduct or numerous other factors wholly independent

of a defendant's testimony. Section 3C1.1, however, is premised upon the wrongful assumption that a guilty verdict necessarily implies a defendant testified untruthfully at trial. This presumption not only exhibits "a chauvinistic faith" in the perfection of our criminal justice system, but completely ignores a reality in which almost every trial error is deemed "harmless" and a prosecutorial mentality which views conviction rates as nothing more than corporate statistics which must be maintained at any cost. *See Dunnigan*, *supra*, 944 F.2d at 185.

Based upon the Guidelines' utopian premise that our system of law is infallible, the government in *Dunnigan* argued that *every* defendant who takes the stand and is convicted should be given an obstruction adjustment under § 3C1.1. *Id.*, 944 F.2d at 183. Amazingly, the government maintained this position despite this Court's explicit warning against enhancing "in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false." *United States v. Grayson*, 438 U.S. 41, 55 (1978). Moreover, it is well established that a criminal defendant may not be subject to a more severe punishment merely because he chooses to exercise his constitutional rights. *Jackson*, *supra*, 390 U.S. at 581; *United States v. Seminole*, 882 F.2d 441, 443 (9th Cir. 1989); *United States v. Safirstein*, 827 F.2d 1380, 1388 (9th Cir. 1987) (judge cannot penalize the exercise of defendant's privilege against self-incrimination by enhancing his sentence for defendant's failure to cooperate); *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (accused may not be subjected to more severe punishment simply because he exercised his right to stand trial). Yet, § 3C1.1 condones, if not requires (according to the government), the imposition of just such punitive sanctions upon any defendant who dares to mount the stand and declare his innocence.

Furthermore, U.S.S.G. § 3C1.1 provides for the punishment of a defendant for perjury without grand jury indictment, notice, trial, compulsory process, assistance of counsel, or conviction beyond a reasonable doubt, a practice which is flagrantly unconstitutional. *See Grayson*, *supra*, 438 U.S. at 53 (punishment for perjury in order to save the government the time and expense of prosecution is "impermissible"); *Dunnigan*, *supra*, 944 F.2d at 184. *See also In re Winship*, 397 U.S. 358, 364 (1970) (Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every element of the crime charged); *Faretta*, *supra*, 422 U.S. at 818 (defendant has Sixth Amendment right to present a defense and confront the prosecution's evidence). To allow § 3C1.1 to stand is to approve, by acquiescence, the transformation of the sentencing court as we know it today from a tribunal of justice into a Star Chamber of efficiency and enforcer of executive policy. *See Faretta*, *supra*, 422 U.S. at 821 n.17.

In addition, § 3C1.1's automatic perjury enhancement may prevent a defendant from exercising his right to testify for fear of the additional punishment he may incur if unsuccessful at trial. *See Dunnigan*, *supra*, 944 F.2d at 183-184 ("With an automatic § 3C1.1 enhancement added to the ante, the defendant may not think testifying worth the risk"). Indeed, a defendant may forego trial entirely and instead plead guilty in an effort to avoid potentially devastating sentence adjustments, especially at the higher offense level ranges. *Id.* at 184 n.5. *See* U.S. Const. amend. VI (jury trial provision).

In *Dunnigan*, the Fourth Circuit boldly and correctly asserted that "[t]he rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf." *Id.* at 185. Even the

Seventh Circuit has recently conceded that to enhance a sentence simply because a defendant testifies "is to punish the testimony *simpliciter*, which raises grave constitutional problems." *United States v. Lozoya-Morales*, 931 F.2d 1216, 1219 (7th Cir. 1991). If the constitutional rights to stand trial and to testify are to remain unchilled and unfettered, this Court must strike down U.S.S.G. § 3C1.1 as an unconstitutional impingement upon these precious fundamental guarantees.

And finally, even if § 3C1.1 should be found to be constitutional, the manner in which the district court in this case found perjury violates the petitioner's constitutional rights as outlined above, and defies due process and fundamental fairness. This case cries out for this Honorable Court to require some modicum of due process, in the form of substantive proof of perjury, before a citizen can be labeled a perjurer and punished therefore.

IV.

DISTRICT COURT'S GOOD FAITH BELIEF INSTRUCTION, WHICH SUBSTITUTED THE WORD "ACTUALLY" IN PLACE OF THE WORD "OBJECTIVELY", WAS VIOLATIVE OF *CHEEK v. UNITED STATES*.

In the present case, the district court gave the following "good faith belief" instruction to the jury:

> A defendant does not act willfully if he believes in good faith that he is acting within the law, or that his actions comply with the law. Therefore, if the defendant *actually* believed that what he was doing was in accord with the tax statutes, he cannot be said to have had the criminal intent to willfully evade or defeat taxes or to willfully fail to file tax returns. This is so even if defendant's belief was not objectively reasonable, as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was *ac-*

> *tually reasonable* as a factor in deciding whether he held that belief in good faith (emphasis added).

The Seventh Circuit affirmed the propriety of the above instruction (App. A at 8), despite petitioner's objections to the repeated use of the term "actually" to qualify both the level of belief and the degree of "reasonableness" at issue. (Tr. 520-521) *See Cheek v. United States*, 498 U.S. ____, 111 S.Ct. 604, 611 (1991).

In the first instance, the court instructed the jury that if the defendant "actually believed" what he was doing was in compliance with the tax statutes, he could not be said to have the intent necessary to sustain a criminal conviction. However, the word "actual" means "having a valid *objective* existence (emphasis added)." *Black's Law Dictionary* 53 (4th ed. 1951) and 33 (5th ed. 1979). Thus, by substituting the word "actual" for the word "objective", the court, in effect, instructed the jury that if the defendant had a belief (which had a valid objective existence) that his actions were in accord with the tax statutes, such belief would negate criminal willfulness.

This semantical word play, which negated the otherwise correct language of the instruction, appears to have been used by the court in an effort to retain the essence of the Seventh Circuit's erroneous "objectively reasonable" standard, while circumventing this Court's recent rejection of such test in *Cheek*, *supra*, 111 S.Ct. at 611 (defendant's good faith belief need not be objectively reasonable in order to negate the government's evidence purporting to show willfulness). Such judicial attempts to disregard the mandates of this Court through linguistic artifice should not be tolerated.

Moreover, the district court instructed the jury that it could determine whether the defendant's belief was "actually reasonable" (i.e., a belief with a valid objective

existence) in deciding whether he held his belief in good faith. In this regard, the Ninth Circuit recently reversed several tax convictions based upon improper *Cheek* instructions very similar to, but less egregious than, the one at issue here. *See United States v. Powell*, 936 F.2d 1056 (9th Cir. 1991), *amended*, 955 F.2d 1206 (9th Cir. 1992). Therein, the Ninth Circuit remarked that "the premise of *Cheek* is that a person cannot be convicted of willful failure to file a tax return if he subjectively believes in good faith that the tax laws do not apply to him. The test does not focus on the knowledge of the reasonable person, but rather on the knowledge of the defendant." *Id.*, 936 F.2d at 1061. In so holding, the *Powell* court reaffirmed the well-established rule that it is error for a court to instruct the jury on any point other than the subjective standard. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991) (reversed and remanded; failure to instruct on subjective standard was plain error); *United States v. Fletcher*, 928 F.2d 495, 501 (2d Cir.), *cert. denied*, 112 S.Ct. 67 (1991) ("what counts is the subjective belief of a defendant . . ., not the degree to which tax laws are, or should be, objectively comprehensible to that defendant"); *United States v. North*, 910 F.2d 843, 886 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 2235 (1991) ("the jury by definition must measure the defendant's intent by a subjective standard"); *United States v. Aitken*, 755 F.2d 188, 192 (1st Cir. 1985) (legal authority "insists on a subjective standard for assessing wilfulness"). Since the trial court's charge instructed jurors to determine whether *they* believed petitioner's belief was "actually reasonable", the instruction clearly failed to adhere to the required subjective standard. *See Powell*, *supra*, 936 F.2d at 1062 (jury may not substitute its own determination of objective reasonableness in place of what the defendant subjectively believed).

The Seventh Circuit's approval of the district court's erroneous instruction employing the term "actually" to qualify both the level of the defendant's belief and the level of reasonableness at issue, whether subjectively intended or not by the Seventh Circuit, effectively undermines the law requiring proof of a strictly subjective state of mind in criminal tax cases. Unless this Court again intervenes, the Seventh Circuit's circumvention of the required subjective standard will continue unabated and, in the Seventh Circuit, *Cheek* will have been a mere exercise in futility.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2737

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK O. BECKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 290—**James B. Zagel**, *Judge.*

ARGUED JANUARY 13, 1992—DECIDED JUNE 5, 1992

Before CUMMINGS, CUDAHY and POSNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In March 1989 defendant Frank O. Becker of Monee, Illinois, was subjected to a twelve-count indictment with respect to tax offenses. Six felony counts charged him with attempting to evade income taxes under 26 U.S.C. § 7201 and six misdemeanor counts with willful failure to file tax returns in violation of 26 U.S.C. § 7203. He was convicted by a jury on all counts and received a total sentence of six years' imprisonment, a fine of $100,000, costs of prosecution and three years' supervised release.

During the 1982-1987 tax years involved in the indictment, Dr. Becker earned more than $850,000 from practicing medicine. During these years, the defendant was

a physician working at Christ Hospital in Oak Lawn, Illinois. He earned $110,000 to $130,000 per year as a salaried physician on that hospital's staff. He also delivered lectures at the Cook County, Illinois, graduate school of medicine and earned honoraria from $390 to $2,200 per year from 1982 to 1987. During that time he also earned $18,000 to $35,000 per year from his private practice. Although he owed more than $300,000 in income taxes, Becker did not file a single tax return from April 1983 to April 1987.

In his private practice, defendant had John Mock & Associates ("JMA") bill his patients. JMA would either bill the patient or the patient's insurance company, and the payment checks would be remitted to JMA, which would deposit them into defendant's bank account. After January 1982, defendant directed JMA to send the payment checks to him, unendorsed and undeposited. From 1982 through 1984 he eliminated each of his bank accounts and deposited all his paychecks into National Commodity Exchange ("NCE"), a Denver, Colorado, so-called "warehouse bank" in which accounts are identified only by an account number. NCE's customers would deposit checks into numbered accounts and then at their direction NCE would write checks on their behalf. These checks were issued in the name of NCE or one of its subsidiaries. From 1985 through 1987 the defendant deposited the bulk of his income checks into his son Steven Becker's checking account at the Peotone Bank in Illinois and defendant's family used that account to pay its bills.

The evidence showed that defendant had his employer, Christ Hospital, stop withholding any federal tax from his earnings after 1983. Although he retained an accountant to file his tax returns for 1979-1981, he ceased using the accountant after the 1981 tax year. He testified that he ceased filing income tax returns or paying any income taxes beginning in 1983 because he had determined that he was not required to do so. He concluded that the amounts he received from his medical practice did not constitute gross income and testified that he consulted with attorney

Robert L. Collins who confirmed his interpretation.[1] In addition, he said that he considered himself an independent contractor after 1983 so that he instructed Christ Hospital not to withhold federal taxes from his earnings.

Defendant admitted that he received checks from various patients for medical services and endorsed them to NCE and that he endorsed other such checks to his son Steven Becker for deposit in the son's bank account. He said that he did not keep any records of his transactions with JMA or NCE.

At the close of the evidence the jury convicted Becker on all twelve counts. On appeal he has raised ten grounds for reversal of his convictions. Alternatively, he advocates a remand for resentencing. We consider the points advanced in the order presented by defendant.

1. Government's alleged failure to introduce evidence of attempted tax evasion under felony counts 1, 3, 5, 7, 9 and 11.

The attempt counts allege that during the years 1982-1987 defendant earned an annual taxable income of approximately $130,000 and that he attempted to defeat the income tax owed in those years by failing to file tax returns, causing his employer to stop withholding federal income tax from his earnings, and endorsing his earnings checks to other individuals and institutions. Defendant argues that although the indictment charges him with acts occurring on or about April 15 of each of the tax years in question, the government introduced acts occurring before April 15 as proof of the attempts. A similar argument was rejected in *United States v. Conley*, 826 F.2d 551, 559 (7th Cir. 1987), where we noted that "whether actually occurring in April or not, the defendant's activities were all related and directed toward his annual ritual

[1] Collins incredibly testified that in late 1982 he advised the defendant that as an independent contractor, any money he received constituted an equal exchange of services for money and was therefore not income.

of avoiding payment of his tax for that particular year." As in *Conley*, this indictment was sufficient to inform the defendant of the felonies with which he was charged, and we decline to adopt defendant's hypertechnical argument.

2. Alleged constructive amendment of the indictment.

Defendant next argues that the government constructively amended the six felony counts charging him with attempting to evade and defeat an income tax due because it was permitted to prove his attempts to evade *payment* of tax. This argument is specious because the counts in question charged Becker with attempt to evade and defeat income tax not only by failing to file the income tax returns before April 15 but also by failing to pay the tax due. Indeed, evading income taxes and failing to pay them are not two separate crimes. "Section 7201 creates only one crime: tax evasion." *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir. 1990), certiorari granted, judgment vacated and remanded on another ground, 111 S. Ct. 747.[2] As we repeat, all of the attempt counts clearly set forth the elements of the charged offenses and therefore no constructive amendment has occurred.

3. Permitting witness speculation and failure to give attendant instruction.

Defendant argues that the IRS agent's testimony that he reviewed "all the income that we had come up with" and "I can't be sure that I had all of the income" impermissibly told the jury that the government was unable to come up with all of defendant's income sources and amounts. The first statement, however, is clearly harmless. Our review of the record indicates that the second

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[2] On the remand in *Dunkel*, this Court did not deviate from the point on which we rely here. *United States v. Dunkel*, 927 F.2d 955, 956 (1991); see also *United States v. Masat*, 896 F.2d 88, 91 (5th Cir. 1990) ("In truth, there is one crime, the evasion of taxes").

statement was retracted after an objection, and the agent's actual testimony was, "I wasn't sure that we had all of the *expenses* to which Dr. Becker was entitled to, nor the verification for some of the *expenses* that he was entitled to" (Tr. 297; emphasis supplied). This testimony could not have caused the jury to make impermissible inferences about possible hidden income.

Defendant also argues that the district judge should have given a cautionary instruction regarding this agent's testimony that deposits in defendant's checking account exceeded his recorded income, citing to net worth method cases.[3] Here the government proved both the amount of income the defendant earned between 1982 and 1987 and the sources of that income. Since the present case was not based on a net worth method of proving income, it was unnecessary for the court to give a cautionary instruction that such a method is itself only an approximation.

In his closing argument, the prosecutor mentioned $32,000 in unaccounted-for check deposits in Steven Becker's checking account by asking "Where are they? We don't know." (Tr. 612). It was permissible for the prosecutor to point out that Steven Becker's story that $25,000 out of the $32,000 came from a family friend who asked the Beckers if she could deposit some money into their accounts was uncorroborated. This was a mild characterization of such suspect testimony and certainly was not improper. *United States v. Hernandez*, 865 F.2d 925, 929 (7th Cir. 1989).

4. Jury instructions on "attempts."

Defendant argues that the instructions given below relating to the Section 7201 attempt charge erroneously permitted conviction for an act of omission. The jury was

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[3] *Holland v. United States*, 348 U.S. 121; *United States v. Tolbert*, 367 F.2d 778 (7th Cir. 1966); *United States v. Hall*, 650 F.2d 994 (9th Cir. 1981).

instructed that the government must prove, as one of the elements of the attempt charge, that the defendant willfully did one of the acts charged in the indictment. The relevant portion of the indictment alleged that Becker committed the following three acts: 1) failing to file an income tax return and pay taxes, 2) causing his employer to stop withholding, and 3) endorsing earnings checks to other parties. Importantly, the jury was also given an "affirmative act" instruction: "[T]he government must prove beyond a reasonable doubt at least one alleged affirmative act * * * . * * * [Y]ou must be unanimous that the defendant committed a particular act for which the purpose, at least in part, was to evade or defeat a tax owing."

Defendant correctly points out that the failure to file returns or pay tax is an act of omission that is not an affirmative act and thus is not sufficient to constitute an attempt under 26 U.S.C. § 7201. *Spies v. United States*, 317 U.S. 492, 499; *United States v. Juniges*, 903 F.2d 468, 475 (7th Cir. 1990). The jury, however, was instructed that it must find that defendant committed a particular affirmative act. Although the jury instructions were not a model of clarity, defendant at trial proposed instructions that were clearly incorrect in requiring the government to prove *all* the acts alleged in the indictment. Defendant's argument on appeal that it was error for the judge not to state explicitly that failure to file a return is not an affirmative act, see *United States v. Masat*, 896 F.2d 88 (5th Cir. 1990),[4] was not made below and is therefore reviewed for plain error. Plain error must be of such magnitude that it probably changed the outcome of the trial or otherwise resulted in a miscarriage of justice. *United States v. Canino*, 949 F.2d 928, 940-941 (7th Cir. 1991),

[4] We note that in *Masat* the jury twice during their deliberations asked the judge to explain the difference, if any, between "tax evasion" and "refusing to pay taxes." The Fifth Circuit concluded that the judge did not adequately respond to the jury's queries. There is, of course, no such indication of jury confusion here.

certiorari denied, 1992 U.S. Lexis 2516. Considering the instructions as a whole, *United States v. Requarth*, 847 F.2d 1249 (7th Cir. 1988), as well as the evidence introduced at trial, we find no plain error on this point. See *United States v. Mal*, 942 F.2d 682 (9th Cir. 1991) (similarly concluding that there was no plain error where jury instructions failed to define further what could not be considered an affirmative act).

5. Refusal to instruct the jury on defense of reliance on advice of counsel.

Defendant asked the court to give a theory of defense instruction stating that defendant could not have the necessary criminal intent if his actions were based upon the advice of counsel. It is of course true that "the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by the law and which has some foundation in the evidence, however tenuous." *United States v. Walters*, 913 F.2d 388, 391 (7th Cir. 1990) (citations omitted). Here there is no evidence that supports the giving of the instruction. As Judge Zagel noted,

> there was no testimony that defendant "told the lawyer everything about your situation and that the lawyer gave you very specific advice and that you followed that specific advice to the letter" (Tr. 538).

Instead the testimony showed that defendant talked to lawyer Robert L. Collins about defendant's point of view on income tax law. According to his own testimony, the defendant had already independently concluded after research that the exchange of his services for money did not generate any income for himself because of the quid-pro-quo nature of the transaction. Collins merely confirmed the "soundness" of this interpretation. The proposition is so preposterous, however, as to be unworthy of belief. The testimony of defendant and Mr. Collins did not indicate that defendant's actions were taken in good faith based upon the advice of counsel, so that such an instruc-

tion was unwarranted.[5] Finally, defendant's theory of reliance on counsel's advice is contradicted by taxpayer's concealment of income during the taxable years.

6. District court's "good faith belief" instruction.

Although defendant argues that the district court erred in not giving his "good faith" instruction in compliance with *Cheek v. United States*, 498 U.S. ____, 111 S. Ct. 604, his own counsel informed the district court that the government's instruction 19, which was given to the jury, "is essentially a correct statement of the law." (Tr. 520). Instruction 19 stated that

> A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. Therefore, if the defendant actually believed that what he was doing was in accord with the tax statutes, he cannot be said to have had the criminal intent to wilfully evade or defeat taxes or to wilfully fail to file tax returns. This is so even if defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.

We agree with defendant's counsel that this instruction is an accurate summary of *Cheek* that appropriately focused the jury's attention on whether the defendant had a good-faith belief he was acting lawfully.

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[5] Defendant also argues that he was improperly cut off from redirect examination of Collins. Since lawyer Collins testified that he believed defendant had already begun his failure to file income tax returns before they met, it was appropriate for the district judge to sustain an objection to returning again to this subject. In any event, any error on this point would be harmless in light of the record as a whole.

7. Alleged violations of Speedy Trial Act.

The Speedy Trial Act ordinarily requires that a defendant pleading not guilty be brought to trial within 70 days of arraignment (18 U.S.C. § 3161(c)(1)), but periods of time dedicated to preparation of pre-trial motions and deliberations thereon are excluded. Judge Zagel determined that there was no violation of the Act because of proper exclusions. He thought that defendant forfeited the right to trial in 70 days by filing, through counsel and on his own, "a large number of motions in a relatively disorderly fashion." (App. 132).

The following three periods of time relied upon by defendant for running the Speedy Trial clock were properly excluded by the district judge since ascribable to defendant:

A. August 11, 1989, through August 20, 1989. On July 14, 1989, defendant filed a motion for bill of particulars and a motion for another extension of time to file more motions. Both were denied August 10. He filed fifteen additional motions on August 21, 1989, which the district court accepted on August 24, simultaneously ordering the government to respond. By allowing defendant to file these additional pre-trial motions the judge in effect granted defendant's July 14th extension motion. Therefore, the exclusion for the running of time continued during this contested period.

B. October 2, 1989, through January 24, 1990. On August 21, 1989, defendant filed a motion to disqualify Judge Zagel. This motion was denied on January 24, 1990. Under the Speedy Trial Act, a district judge may normally take no more than 30 days to decide a pre-trial motion. § 3161(h)(1)(J). In this case, however, defendant filed fifteen substantive motions on August 21, 1989. In such a situation, the 30-day rule does not apply, and the judge need only decide the motions with reasonable promptness. "We are unwilling to impute to Congress a purpose, nowhere stated or even hinted at by it, to require a judge to decide a collection of pretrial motions within 30 days, no matter how many there are." *United States v. Tibboel*,

753 F.2d 608, 612 (7th Cir. 1985); see also *United States v. Nesbitt*, 852 F.2d 1502, 1514 (7th Cir. 1988), certiorari denied, 488 U.S. 1015.

Because of the circumstances of this case, we conclude that the district judge acted with reasonable promptness. We note initially that a motion to disqualify a judge is a motion that typically must be given more than an ordinary amount of thought. The basis of defendant's motion in this case was that Judge Zagel was a named defendant in an unrelated civil action where defendant Becker's attorney represented the plaintiffs. This allegation required serious inquiry into the nature of the case in which Judge Zagel had been sued and its relationship to the case over which Judge Zagel was presiding.

In addition, defendant's delaying conduct in this case was a primary cause for any seemingly late rulings by the judge. Briefing for the fifteen motions was not completed until October 5, 1989. After denying defendant's motion to disqualify at the January 24, 1990, status hearing, Judge Zagel indicated that he would be ready to rule on the remaining motions within a week or two. Defendant's counsel objected to any "hurried rulings" in this "complex case." (Tr. 69). The record indicates that defendant's counsel communicated to Judge Zagel that he was hopeful that a plea agreement might be arranged when the new United States Attorney took office.

On February 12, 1990, Judge Zagel ruled that a hearing was necessary on the evidence suppression issue. This hearing was held, after several delays either caused or approved by defendant, on June 20, 1990, and the district court held on July 31, 1990, that the evidence would not be suppressed. It is important to note that the defendant filed 21 additional motions after January 24, 1990, and before trial in April 1991.[6] Most of these motions were dis-

[6] The defendant filed motions on the following dates: February 15, 1990; June 20, 1990; July 18, 1990 (2 motions); September 10, 1990; November 9, 1990; December 4, 1990; December 12, 1990 (2 motions); December 27, 1990 (2 motions); January 31, 1991 (7 motions); March 11, 1991; March 19, 1991.

posed of within 30 days. On December 17, 1990, defendant's counsel indicated that he was forced to withdraw from the case. On that date, Judge Zagel again stated that he was ready to rule on all pre-trial motions, but then stated he would wait until defendant was able to procure a new attorney. Because of the volume of motions filed by defendant, the time between October 2, 1989, and January 24, 1990, was properly excluded.

C. March 11, 1991, through March 18, 1991. On March 11, 1991, defendant filed a motion requesting the court to rule on pending motions, so that the short time the court took to consider it is also excludible.

In sum, defendant has not persuaded us that the Speedy Trial Act was violated during the three periods specified. Nevertheless district judges should dispose of motions as promptly as possible to observe the spirit of this legislation and thus avoid cries of error.

8. Refusal to instruct the jury that labor and money are "property" under income tax laws.

The defendant requested an instruction that his labor constituted property equal to the money he received, so that no income tax was due. However, he cites to no case supporting an instruction that states that wages are not income, and indeed we have already held on numerous occasions that defendant's contention is ridiculous. *United States v. Dube*, 820 F.2d 886, 891 (1987); *United States v. Koliboski*, 732 F.2d 1328, 1329 n.1 (1984). As noted above, the court gave a proper instruction regarding defendant's good faith as required by Cheek. To have given the instruction requested by defendant would have been erroneous under our well-established case law.

9. Records obtained by government through IRS administrative summonses were properly received.

Defendant argues that the district court should have suppressed evidence obtained by the government through administrative summonses allegedly after institutional aban-

donment of civil purpose. 26 U.S.C. § 7602 authorizes the IRS to issue administrative summonses involving both the civil and criminal elements of the tax laws. *United States v. LaSalle National Bank*, 437 U.S. 298, 300, 309. The IRS oversteps its bounds if it uses the summons (for any purpose, civil or criminal) after referring the case to the Justice Department, 26 U.S.C. § 7602(c), or if it uses the summons solely to gather evidence for a criminal prosecution before referring the case. *United States v. Michaud*, 907 F.2d 750, 754 (7th Cir. 1990) (en banc).

Here the summonses at issue were served in 1986, and defendant's case was not referred to the Justice Department for prosecution until January 1988. Thus there is no violation of the bright-line rule established by Section 7602(c). Since defendant has not otherwise met his burden of showing that the IRS had "no civil purpose whatsoever" here, *Michaud*, 907 F.2d at 754, the evidence obtained by the summonses was properly received.

10. Government's closing argument.

Defendant complains that an improper statement was made to the jury during the prosecutor's closing argument. At the trial, defendant's accountant, Richard Podgorski, testified that defendant believed that the Constitution said it was unconstitutional to be paying income taxes on his earnings. This was paraphrased by the prosecutor during the government's rebuttal argument that "Podgorski told you [jurors] that defendant told him that the tax laws were unconstitutional." This was a harmless summation of Podgorski's testimony and perfectly proper. *United States v. Doyle*, 771 F.2d 250, 258 (7th Cir. 1985).

11. Propriety of sentence imposed.

The district court sentenced Becker to a total of six years' imprisonment, three years' supervised release, $100,000 fine, and cost of prosecution. This was in accord with the Sentencing Guidelines. The offense level was increased by two points because the district court found

that Becker's testimony was perjurious. As Judge Zagel said:

> I find in fact the defendant perjured himself in a gross, utterly unconvincing and blatant fashion. * * * He is simply not to be believed * * * and his testimony was offered in a manner and form which I think is contemptuous of the ability of both the jury and the Court to determine the truth. (App. 17).

The record supports this finding, and the two-level adjustment under Section 3C1.1 of the Guidelines was in no way clear error, which is the standard of review we apply. *United States v. Teta*, 918 F.2d 1329, 1332 (7th Cir. 1990).

Judge Zagel also increased the base offense level by two points after finding that defendant employed "sophisticated means" within Guidelines Section 2T1.2(b)(2) to cover his crimes. We also review this finding for clear error. As previously noted, Becker used a so-called "warehouse bank" to hide his assets under an account identified not by Becker's name or social security number but only by an arbitrary number. In addition, he eliminated all bank accounts in his name and deposited his earnings in his son's account. As the district judge found, these steps were taken to make it "difficult, if not impossible, to discover his income and to inquire into his finances * * *." (App. 16-17). This finding supported the two-level increase under Section 2T1.2(b)(2) as the use of sophisticated means to impede the government's discovery of crimes.

Consecutive sentences were imposed for defendant's violations of 26 U.S.C. §§ 7201 and 7203. Defendant received three years' imprisonment on the tax evasion counts under Section 7201 and three years on the willful failure to file tax return counts under Section 7203. He reasons that the convictions under the failure to file tax returns (Section 7203) were lesser included offenses subsumed by the convictions for tax evasion under Section 7201. Whether Section 7203 is a lesser-included offense of Section 7201 is a question of law subject to *de novo* review on appeal. *Teta*, 918 F.2d at 1329. The law on this subject, how-

~~over, is~~ well settled in this Circuit. Section 7203 does not require

> an affirmative act, whereas a §7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. (citation omitted). Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense * * *. Finally there is no indication that Congress did not intend these two statutory provisions to be separate offenses.

United States v. Foster, 789 F.2d 457, 460 (7th Cir. 1986), certiorari denied, 479 U.S. 883. We have consistently adhered to *Foster*.[7]

There will be no remand for resentencing.

Defendant's conviction and sentence are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] See *United States v. Defazio*, 899 F.2d 626, 636 (7th Cir. 1990); *United States v. Buckner*, 830 F.2d 102, 104 (7th Cir. 1987); *United States v. Davenport*, 824 F.2d 1511, 1519 (7th Cir. 1987).

APPENDIX B

[Page 1 of 5]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
NO. 89 CR 290-1

UNITED STATES OF AMERICA

v.

FRANK O. BECKER

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT: ☒ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 26:7201; Nature of Offense: Tax Evasion; Date Offense Concluded: 15 Apr 87; Count Number(s): 1, 3, 5, 7, 9, 11;

Title & Section: 26:7203; Nature of Offense: Wilful failure to file return, supply information, or pay tax; Date Offense Concluded: 15 Apr 87; Count Number(s): 2, 4, 6, 8, 10, 12.

* * * * * * *

[Page 2 of 5]

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *SEVENTY [sic] (72) MONTHS*. This term con-

sists of THIRTY-SIX (36) MONTHS on each of counts 1, 3, 5, 7, 9, 11 to be served concurrently with each other; TWELVE (12) MONTHS on count 12, to be served consecutively to counts 1, 3, 5, 7, 9, 11; TWELVE (12) MONTHS on each of counts 2, 4, 6, 8, 10; custody on counts 6, 8, 10 to be served concurrently with each other but consecutive to counts 2 and 4; custody on counts 2 and 4 to be served consecutive to counts 1, 3, 5, 7, 9, 11 and 12.

* * * * * * *

[Page 4 of 5]

The defendant shall pay a fine of *$100,000.00*. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

Count 11, fine of $50,000.00

On each of counts 2, 4, 6, 8, and 10, $10,000.00 each.

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[Page 5 of 5]

Guideline Range Determined by the Court:

Total Offense Level: *19*

Criminal History Category: *I*

Imprisonment Range: *30* to *37* months

Supervised Release Range: *2* to *3* years

Fine Range: *$6,000.00* to *$60,000.00*

* * * * * * *

/s/ James B. Zagel
U.S. District Judge

Date: July 18, 1991